

August 24, 1993

Public Health Division
Room 4A-53 Parklawn Bldg.
5600 Fishers Lane
Rockville, Maryland 20857
(301) 443-2644

TO : Michel E. Lincoln, Acting Director
Indian Health Service

FROM : Barbara Hudson, Attorney
Office of the General Counsel

SUBJECT : Request for Opinion 93-86: Facilities
Construction Programs Under Self-Governance

In preparing for the implementation of Title III of the Indian Self Determination Act, you have asked our opinion on the following questions.

1. May IHS waive the Federal Acquisition Regulations (FAR) for construction projects in Title III compacts?

Your question assumes that Title III compacts and funding agreements will be used to define the relationship between IHS and a tribe for discrete Federal construction projects, e.g., construction of an IHS hospital or outpatient facility. However, we do not view the construction of a Federal facility as appropriate for inclusion within a compact or funding agreement. This would include sanitation facilities constructed under Pub. L. 86-121 authority and later transferred to a tribe under that authority. While Indian tribes may contract under the Indian Self Determination Act (ISDA) for discrete construction projects including clinic and sanitation facilities, there is nothing in Title III that changes what is essentially a procurement relationship between the IHS and the tribe for construction of discrete Federal projects.

To answer your specific question, we do not believe that IHS has any additional waiver authority with respect to the FAR under Title III compacts than it does under Title I contracts. With respect to the construction of Federal facilities, the contracting officer's responsibility is an inherently governmental function which must be performed by an official of the Executive Branch of the United States. The Office of Management and Budget (OMB) issued a policy letter that sets forth the functions which must be performed by Government employees. According to the policy letter, "[a]n inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to: (a) Bind the United States to take or not to take some action by contract" Further, Appendix A of the policy letter lists the awarding,

administering, and terminating of contracts as examples of inherently governmental functions. (57 Federal Register 45096 - 45103 (1992)).

Moreover, the legislative history surrounding the enactment the 1987 amendments to the ISDA recognized that certain Secretarial functions could not, as a matter of law, be contracted or performed by non-government employees. The original drafts for the 1988 amendments to ISDA proposed expanding the Secretary's authority to contract "any and all of the functions, authorities and responsibilities of the Secretary of Health and Human Services under the Act of August 5, 1954." S. Rep. 274, 100th Cong. 1st Sess. 71 (1987). However, prior to final enactment of the 1988 amendments, the above language was deleted based on legal and constitutional questions raised by the Department of Justice. The Department of Justice concluded that the proposed language was in serious tension with the constitutional doctrine of separation of powers and, in particular, with the Appointments Clause of Article II, Section 2, Clause 2. Under the U.S. Constitution, a person who exercises "significant authority pursuant to the laws of the United States" is an "Officer of the United States", and must, therefore, be appointed in the manner prescribed by the Appointments Clause. Buckley v. Valeo, 424 U.S. 1, 126 (1976). Representatives of tribal organization obviously are not appointed as principal officers by the President with the advice and consent of the Senate, or as inferior officers by the President alone, the Courts of Law, or the Head of a Department, as provided for by that clause. Thus, the Secretary of HHS, who is an Officer of the United States, may not enter a compact which divests the Secretary of inherently governmental functions.

In conclusion, we believe that Title III compacts may appropriately be used to plan, conduct, consolidate, redesign, and administer programs but not for a discrete construction project. A Self Governance (SG) Tribe may continue to use the Title I authority to apply for a construction contract. Under section 105(a), the Secretary continues to have authority to waive certain FAR provisions which he or she determines are not appropriate for the purposes of the contract. However, we find no legal basis which would permit the Secretary to enter a compact for the construction of a Federal facility thereby waiving the contracting officer's inherently governmental function related to construction.

2. May the requirements of the Davis-Bacon Wage rates be waived by the Secretary or the Self-Governance Tribe for construction, maintenance, and improvement projects in Title III compacts?

Clearly, section 7, which describes the Davis-Bacon wage requirements, applies to construction contracts under Title I. As discussed above, we do not view the construction of a Federal facility as appropriate for inclusion in a compact or funding agreement. Moreover, even if compacts were used for construction, we believe section 7 of ISDA would apply to such compacts.

In answer to your question, we find no authority for the Secretary to waive section 7 or the Davis-Bacon Act. However, it is important to note that there is an exception to the application of the Davis-Bacon Act to tribal governments. Under the Davis-Bacon Act, the Solicitor of Labor concluded that States or political subdivisions of States are not, as prime contractors, bound by the prevailing wage requirements of the Act. This exception has been interpreted to include force account labor of Indian tribal governments and tribal governmental instrumentalities.

3. May we assume that Self Governance tribes assume all legal responsibilities for obtaining clearances and have obligation for environmental compliances, handicapped access compliances, energy conservation compliance, etc?

As previously indicated in opinions from this office (see attached opinions by Lindsay Naas), the FAR governs all Federal construction contracts. As described in the attached opinions, responsibilities for obtaining clearances and compliance with Federal and State laws continue to be an IHS responsibility.

4. May IHS require SG tribes to sign an assurance for compliance?

See answer to question 3.

5. May IHS require the SG tribes to sign the compact with this requirement?

See answer to question 3.

6. Are the compacts authorized by Title III considered "contracts" or "grants", or neither?

Although not specifically applicable under section 9 of ISDA, the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. 6301, et seq., provides a good point of reference for defining the three basic types of legal instruments which the government uses to transact business. They are a procurement contract, a grant, and a cooperative agreement.

A procurement contract is defined as an instrument used to acquire property or services for the direct benefit or use of the United States Government. 31 U.S.C. 6303. A grant is an instrument between the Federal Government and a non-federal entity when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose and no substantial continuing involvement of the United States is expected in carrying out the activity covered by the grant agreement. 31 U.S.C. 6304. A cooperative agreement is a legal instrument which is used between the Federal Government and a non-federal entity when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by law, and substantial involvement is expected between the United States and the recipient in carrying out the agreement. 31 U.S.C. 6305.

Often agreements between governments are referred to as compacts. These compacts contain characteristics of both a contract and a grant. According to the Supreme Court, compacts have many of the indicia of contracts, i.e., they contain legally binding rights and obligations for the two governments. (Texas v. New Mexico, 482 U.S. 124, 128 (1987).) While a compact may be a type of contract, we note that it is not a procurement contract because it is not a contract for the procurement of goods and services for the United States. Further, while a compact has many of the indicia of a contract, it also has characteristics similar to an assistance relationship, e.g., grant, in that IHS has little continuing involvement with the Tribe as it carries out the programs under the compact.

In summary, while compacts have characteristics similar to both grants and contracts, a compact has its own unique authority under Title III of the ISDA which essentially establishes a demonstration program.

I hope this information is helpful to you. If you have any questions, please feel free to contact me at 301-443-1212.

A handwritten signature in cursive script, appearing to read "Barbara Hudson".

Barbara Hudson

Attachments

Office of the General Counsel
Rockville, MD 20857

January 28, 1991

TO: Director, Billings Area Office
Indian Health Service

FROM: Attorney Advisor
Public Health Division

SUBJECT: Contractibility of Sanitation Facilities Construction
Branch at the Flathead Service Unit

You have requested that we review a proposal submitted by the Confederated Salish and Kootenai Tribes of the Flathead Nation (CS&KT) to contract under the Indian Self-Determination Act, Pub. L. 93-638, as amended, 25 U.S.C. 450 et seq., to assume the activities of the Sanitation Facilities Construction (SFC) Branch at the Flathead Service Unit, to determine whether those activities are contractible. As you note in your request, we have recently addressed the contractibility of an SFC Branch in Kincheloe, Michigan. 1/

In the Kincheloe opinion, we address the question whether an SFC Branch, which carries out all of the project activities of the branch through Federal construction contracts, is contractible under the Self-Determination Act, and conclude that the Federal Acquisition Regulation (FAR), Title 48, Code of Federal Regulations, which governs all construction contracts, effectively requires that the Indian Health Service (IHS) retain the construction contract administration and management activities associated with an SFC Branch project. See Kincheloe opinion pp. 3-6 for specific FAR requirements. The opinion further concludes that the remaining portion of SFC Branch activities (all non-project and the remaining project activities) are contractible.

The Kincheloe opinion applies to the CS&KT proposal to the extent SFC Branch projects are accomplished through Federal construction contracts. Because the SFC Branch at the Flathead Service Unit also carries out construction projects under Memoranda of Agreement (MOA) between the IHS and the tribe, the

1/ Memorandum dated December 11, 1990, entitled "Contractibility of Sanitation Facilities Construction Branch Program at Kincheloe, Michigan" (hereinafter referred to as the "Kincheloe opinion") (attached).

CS&KT proposal raises the additional question whether the program is contractible if the construction projects are carried out under MOAs. In accord with the following analysis, regardless of whether the project is accomplished through a Federal construction contract or through an MOA, the Federal managerial portion of the SFC Branch project activities is not a "program" within the meaning of section 102 of the Self-Determination Act and thus, may not be assumed under a Self-Determination Act contract. As in the Kincheloe situation, the non-project and remaining project activities are contractible. Further, in this situation, we question whether the cooperative arrangements discussed below are appropriate methods to accomplish projects if the tribe has the administrative and technical capability to assume the SFC Branch.

BACKGROUND

The activities of the SFC Branch generally include "project" and "non-project" activities. Non-project activities include maintaining a priority listing of the requests and needs of individual homeowners for sanitation facilities, surveying existing sanitation facilities, and providing technical assistance to tribes operating and maintaining sanitation facilities. Non-project activities constitute a relatively small portion of total SFC Branch activity. The major activity of the SFC Branch involves the construction of sanitation facilities for Indian homes and communities.

The SFC Branch's construction activities are authorized by the Indian Sanitation Facilities Act of 1959 (ISFA), Pub. L. 86-121, 42 U.S.C. 2004a. In addition, section 302 of the Indian Health Care Improvement Act, Pub. L. 94-437, as amended, 25 U.S.C. 1632, provides further detail on the IHS' authority to provide sanitation facilities to Indian homes and communities. The ISFA amends the Transfer Act, 42 U.S.C. 2001 et seq., in which the Department of the Interior's functions, responsibilities, authorities, and duties regarding Indian health were transferred to the Department of Health and Human Services. The ISFA provides, in relevant part, as follows:

Sec. 7 (a) In carrying out his functions under this Act with respect to the provision of sanitation facilities and services, the Surgeon General is authorized--

(1) to construct, improve, extend, or otherwise provide and maintain, by contract or otherwise, essential sanitation facilities . . . for Indian homes, communities, and lands;

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(3) to make such arrangements and agreements with appropriate public authorities and non-profit organizations or agencies and with the Indians to be served by such sanitation facilities (and any other person so served) regarding contributions toward the construction, improvement, extension and provision thereof, and responsibilities for maintenance thereof, as in his judgment are equitable and will best assure the future maintenance of facilities in an effective and operative condition.

The authority in sections 7(a)(1) (to provide sanitation facilities by contract or otherwise) and 7(a)(3) ("to make such arrangements and agreements with . . . the Indians to be served by [the project]") has been interpreted to give the IHS broad discretion in choosing methods of providing sanitation facilities to Indian homes and communities. 2/ This flexibility reflects an objective of the Act--to encourage the maximum participation of those to benefit from the project. 3/ See H. R. Rep. 589, 86th. Cong. 1st Sess. reprinted in 1959 U.S. Code & Cong. Ad. News p. 1963.

Currently, all SFC Branch projects are carried out under an MOA between the IHS, the tribal governing body representing the group to benefit from the project, and sometimes third parties such as other Federal agencies or local governments. The MOA establishes an "umbrella" cooperative relationship between the parties to carry out the project. Among other things, the method of accomplishing the work is agreed upon in the MOA. The

2/ See Memorandum from Bernzweig to Tilson dated June 22, 1966 entitled "Authority to make direct Federal payments to Indians engaged in Pub. L. 86-121 projects", and; Memorandum from Edelman to Stevenson dated October 22, 1959 entitled "Provision of facilities-Participation in projects-Cooperative arrangements-Transfer of facilities".

3/ The Act's flexibility and objective of encouraging maximum participation can be viewed as a precursor to the Federal policy of Indian self-determination. (The ISFA was enacted in 1959; the Self-Determination Act was initially enacted in 1975.) Since 1959, the SFC Branch, through various cooperative agreements and arrangements, has assisted tribes in developing administrative and technical capability by providing sanitation facilities in their own communities with Federal financial and technical assistance.

construction of a sanitation facilities project is generally accomplished one of two ways--funds can be provided through the award of a Federal contract, or through the MOA itself. If funds are to be provided under the MOA, the IHS uses various types of "cooperative agreements or arrangements", the terms of which are set out in the MOA, depending on the nature of the project and the participating tribe's administrative and technical capability to carry out the project.

In this situation, if funds are provided under an MOA, the methods used to accomplish projects would be the Tribal Force Account, Tribal Procurement, or a combination of these methods. Briefly, under the Tribal Force Account method, the tribe accomplishes the work with tribal employees under the direction of a tribal construction supervisor. The IHS (SFC Branch) provides the funds for the project as well as technical assistance relating to construction methods and skills improvement. This method is used, in theory, where the tribe does not have the administrative or technical capability to carry out the project without the substantial involvement of the IHS. Under the Tribal Procurement method, the tribe uses IHS project funds to provide the required sanitation facilities through its own internal procurement system. This method was initially used to assist tribes in developing their administrative capabilities. Both methods facilitate the ISFA's objective of encouraging maximum participation in a project where the tribe does not have the administrative and/or technical capability to accomplish the project through a Federal construction contract.

DISCUSSION

Section 102(a) of the Act provides the basic authority for tribes and tribal organizations to assume IHS programs or portions of programs. Section 102(a) provides, in relevant part, as follows:

The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs . .

The basic objective of the Federal policy of Indian self-determination "is to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members". S. Rep. 274, 100th Cong. 1st Sess. 6 (1987). Section 102 effectuates this objective by directing the Secretary to contract with requesting tribal organizations to assume IHS service "programs or portions thereof". When a tribe chooses to operate services for its members, the Secretary is required to

transfer resources and control over the program to the contracting tribe or tribal organization. See S. Rep. 274 at 6.

Under the Tribal Force Account and Tribal Procurement methods of carrying out construction projects, SFC Branch staff perform various planning, cost control and quality assurance activities analogous to those required by the FAR to be performed by Federal employees when a project is accomplished through a Federal contract. See IHS "MOA Guidelines", May 21, 1990 Working Draft, pp. 33-48. These activities are administrative and managerial activities conducted for the Secretary to ensure quality and fiscal accountability on all projects rather than part of the services "program" at the service unit level. 4/ While a tribe or tribal organization may contract to operate services for its members, contracting does not divest the Secretary of his responsibilities, in this instance related to oversight of sanitation facilities construction projects by the SFC Branch. Thus, the IHS must retain those activities necessary to carry out its managerial or executive responsibilities as a Federal agency. In summary, the Federal managerial activities conducted by SFC Branch staff, such as planning, cost control and quality assurance activities, are not part of the services activities of the branch which constitute a contractible portion of a "program" within the meaning of section 102 of the Act. Rather, they are activities which the IHS conducts as part of its responsibilities to the Secretary. Accordingly, these Federal managerial activities are not contractible.

Additionally, we note that this proposal involves a one-tribe service unit. If this program were entirely assumed by the CS&KT, the tribe would be administering the activities of the SFC Branch, as well as participating in projects benefitting its members through Federal construction contracts or other cooperative arrangements. (The tribe would be carrying out both the federal and tribal sides of the contract or MOA.) If the tribe has the technical capability to carry out the activities of the SFC Branch, neither the Tribal Force Account nor the Tribal Procurement method is an appropriate method of accomplishing scheduled projects as these methods are intended for use in situations where the tribe does not have the administrative or

4/ In fact, in most IHS Areas, the Field Engineers who administer the SFC Branch are under the direct administrative and technical supervision of the SFC Branch Chief at the Area Office level, rather than under the direction of the Service Unit Director. The SFC Branch staff is organized in this way to maintain the mobility of these positions within an IHS Area because the funding for these positions is determined by project workload and varies greatly from year to year at any location depending on the type and number of projects funded for that location for that year.

technical capabilities to enter into direct Federal construction contracts. If the tribe does not have the technical capability to carry out a project under a construction contract, its proposal to assume the SFC Branch would be declined under the "declination criteria" in section 102(a)(2) of the Act because it would not be able to provide satisfactory services.

CONCLUSION

In conclusion, if the tribe has the administrative and technical capability to assume the activities of the SFC Branch, we question whether the Tribal Force Account or Tribal Procurement methods are appropriate methods to accomplish construction projects in this situation. Regardless of whether an SFC Branch construction project is accomplished through a Federal construction contract or through a Memorandum of Agreement, there are certain Federal managerial activities associated with the projects which are conducted for the Secretary to ensure quality and fiscal accountability on each project. These Federal managerial activities are not "programs or portions thereof" within the meaning of section 102 and thus, are not contractible. The non-project and remaining project activities are contractible.

Lindsay Naas
Lindsay Naas

Attachment

Office of the General Counsel
Rockville, MD 20857

DEC 11 1990

MEMORANDUM

To: Associate Director
Office of Environmental Health and Engineering

From: Attorney Advisor
Public Health Division

Subject: Request for Opinion #90-13: Contractibility of
Sanitation Facilities Construction Branch Program at
Kincheloe, Michigan

You have asked whether the Sanitation Facilities Construction Branch (SFCB) program at Kincheloe, Michigan, can be contracted out under the Indian Self-Determination Act (the "Act") when a major portion of the program involves construction contract management. In accord with the following analysis, the Federal Acquisition Regulation (FAR), which governs all construction contracts, effectively requires that the Indian Health Service (IHS) retain the construction contract administration and management activities identified below. The remaining portion of the program may be assumed under a Self-Determination Act contract, however, the IHS may retain the portion of funding available for the program commensurate with the portion of SFCB program activities retained.

BACKGROUND

In November of 1989 1/, the Inter-Tribal Council of Michigan (MITC) submitted a proposal to contract for the operation of the IHS Field Health Office program located at Kincheloe, Michigan. The MITC proposal included several programs, one of which is the SFCB program at issue here. The proposal generally describes the SFCB program and outlines, by position, the specific activities

1/ The original proposal is dated November 15, 1989. By mutual agreement of MITC and the IHS/Bemidji Area Office, MITC's request to assume the SFCB program at Kincheloe was put on hold. By letter dated October 5, 1990, MITC reactivated their request to assume the SFCB program at Kincheloe. This letter was received in the IHS/Bemidji Area Office on October 12, 1990.

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of the program and the duties of each position. The proposal identifies three positions which were previously assigned to the SFCB program at Kincheloe--a Field Engineer, an Engineer Technician, and a Secretary--which it is requesting IHS to fund through the proposed contract. 2/

The activities of the SFCB program generally include "project" and "non-project" activities. Non-project activities include maintaining a priority listing of the requests and needs of individual homeowners for sanitation facilities, surveying existing sanitation facilities, and providing technical assistance to tribes operating and maintaining sanitation facilities. Non-project activities constitute a relatively small portion of total SFCB program activity. The major activity of the SFCB program involves the construction of sanitation facilities for Indian homes and communities.

The SFCB program's construction activities are authorized by the Indian Sanitation Facilities Act of 1959 (ISFA), Pub. L. 86-121, 42 U.S.C. 2004a. The ISFA amends the Transfer Act, 42 U.S.C. 2001 et seq., in which the Department of the Interior's functions, responsibilities, authorities, and duties regarding Indian health were transferred to the Department of Health and Human Services. The IHS' authority to provide sanitation facilities to Indian homes and communities is part of its general responsibility to conserve Indian health. The ISFA provides, in part, as follows:

Sec. 7 (a) In carrying out his functions under this Act with respect to the provision of sanitation facilities and services, the Surgeon General is authorized--

(1) to construct, improve, extend, or otherwise provide and maintain, by contract or otherwise, essential sanitation facilities . . . for Indian homes, communities, and lands;

* * *

The construction of a sanitation facilities project is generally accomplished through the award of a firm-fixed-price

2/ At the outset, we note that under section 102 of the Act, the IHS may enter into contracts with tribal organizations to plan, conduct and administer programs or portions thereof. This authority is to contract for programs rather than for positions. In this memorandum, the contractibility of the SFCB program, rather than the contractibility of individual positions, will be discussed.

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contract, 48 C.F.R. 36.207(a), which is subject to the other requirements of the FAR, 48 C.F.R. 36.101(a).

Further, while most contracting under the Self-Determination Act was exempted from the FAR requirements, construction contracts remain subject to the FAR. The proviso to section 105(a) of the Act states as follows:

PROVIDED FURTHER, That, except for construction contracts (or sub-contracts in such cases where the tribal contractor has sub-contracted the activity), the Office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.) and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts.

Pub. L. 100-472, Section 105(a) (emphasis added). Thus, even when a sanitation facilities project is built under a Self-Determination Act contract, the contract is subject to FAR requirements.

DISCUSSION

Contractibility of the SFCB Program

Section 102(a) of the Act provides the basic authority for tribes and tribal organizations to assume IHS programs or portions of programs. Section 102(a) provides in relevant part as follows:

The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs . . .

While it is clear that Congress intended this section to be broad authority for tribal organizations to assume IHS programs, there are some activities which are not contractible. 3/ Relevant to the contractibility of the SFCB program, as outlined above, the construction of a sanitation facilities project is

3/ This memorandum will only address the MITC proposal to assume the SFCB program at Kincheloe and the factors involved in assuming this program. The memorandum will not attempt to define a standard or criteria for determining when other programs are or are not contractible.

subject to the requirements of the FAR. Thus, SFCB program activities related to the administration and management of the actual construction contracts 4/ are governed by the FAR.

As part of the review of MITC's proposal, the Bemidji Area Office (BAO) SFCB staff broke down all SFCB project activity into five phases. See attached BAO/SFCB report, p. 3. Within these phases, the "requisition" and "cost estimate" activities in the Project Design phase and the "inspection" activities in the Contract Management phase involve preparation for and management of the actual construction contracts.

The requisition and cost estimate activities in the Project Design phase involve preparing the government's estimate of cost for the project and completing the actual requisition form to solicit a contractor for the project. The requisition contains the cost estimate. Both activities are governed by the FAR at 48 C.F.R. Chapter 1, Part 36, Subpart 36.2. 48 C.F.R. 36.203 provides, in relevant part, that "[a]ccess to information concerning the Government estimate shall be limited to Government personnel whose official duties require knowledge of the estimate. . . ." This regulation reflects one of the overall purposes of the FAR which is to ensure that the government pays the lowest price for the work to be acquired. If a tribal organization were to know the Government's cost estimate, the Government's ability to negotiate the lowest price could be frustrated. Accordingly, the FAR essentially mandates that these activities may not be performed by a tribal employee under a Self-Determination Act contract.

Inspection activities are governed by the FAR at 48 C.F.R. Chapter 1, Part 46, Subpart 46.4 ("Government Contract Quality Assurance"). 48 C.F.R. 46.312 requires that the contracting officer insert the clause 52.246-12, "Inspection of Work", in all fixed-price construction contracts. The Inspection of Work clause provides, in part, that "[a]ll work shall be conducted

4/ On this point, MITC's proposal provides that "[c]onstruction of Public Law 86-121 projects shall continue under contracts issued by the Bemidji Area Contracting Officer". Proposal p. 24. The proposal further provides that "[t]he Contracting Officer's Representative (COR), the person who will certify construction work is complete and approve contractor pay requests, must be a government employee". Proposal p. 24. MITC proposes that the tribally-employed Field Engineer would serve as technical representative for the government COR. The proposal provides that the Field Engineer would monitor current and future projects and notes that the Rhinelander District Engineer will serve as the COR. Proposal p. 21.

under the general direction of the Contracting Officer and is subject to Government inspection and test . . ." and that "Government inspections and tests are for the sole benefit of the Government . . ." Further, 48 C.F.R. 46.401(e) explicitly provides that "[g]overnment inspection shall be performed by or under the supervision of Government personnel." Under these provisions, responsibility is placed with a government employee to inspect a contractor's performance for the benefit and protection of the government. We note that the IHS could contract with a consultant to do some of the inspection. This is because under such consultant contracts the government retains some control over the work done by the contractor. By contrast, it is a fundamental premise of Self-Determination Act contracting that, when a program is assumed under the Act, the IHS turns over all direction and control of the day-to-day operation of the program to the tribal organization. The IHS does not and cannot supervise the day-to-day operation of a contracted program. 5/ Applied here, the responsibility placed with the IHS under the FAR cannot be contracted out to be performed by a tribal employee under a Self-Determination Act contract because the government does not retain direction or control over the work of tribal employees under such contracts.

Similarly, the Department's implementation of the FAR at 48 C.F.R. Chapter 3, Subchapter G, Part 342, Subpart 342.70 addresses contract monitoring. Under 48 C.F.R. 342.7002(b), "[t]he contracting officer is responsible for assuring compliance with all terms of the contract . . ." The contracting officer depends on program, technical, and other personnel for assistance and advice in monitoring the contractor's performance and must assure that responsibilities assigned to such personnel are understood and carried out. 48 C.F.R. 342.7002(c). The government contracting officer is ultimately responsible for assuring compliance with all terms of the contract and relies on

5/ The unique nature of a Self-Determination Act contract is explained in the Senate Report that accompanied the 1988 amendments to the Act, as follows:

The Indian Self-Determination Act uniquely requires the . . . Secretary of Health and Human Services to continue providing direct services until such time as a tribe freely chooses to contract to operate those services. At that point, the Secretar[y is] required to transfer resources and control over those programs to the tribe. There is no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources. . . .

Rep. 274, 100th Cong. 1st Sess. 6.

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program and technical personnel for assistance in monitoring compliance. A tribal employee cannot serve as technical representative for the government's contracting officer, as proposed, because, as explained above, the contracting officer exercises no supervision or control over the tribal employee's work and, therefore, cannot assure that responsibilities assigned to a tribal employee are carried out.

Additionally, even if the FAR permitted the cost estimate and inspection activities to be conducted by other than government employees, we note the potential for so-called organizational conflicts of interest in the event MITC or one of its member tribes proposed to contract for one of the construction projects MITC would manage under the SFCB program. See 48 C.F.R. Chapter 1, Subchapter B, Part 9, Subpart 9.5- Organizational Conflicts of Interest.

In conclusion, the requisition, cost estimate, and inspection activities of the SFCB program (or essentially all of the activities related to management of the actual construction contracts) are effectively required by the FAR to be conducted by federal employees. Thus, MITC's proposal that a tribally employed Field Engineer would serve as the technical representative for the government COR and would monitor project activity cannot be approved.

Funding Available for Contractible Portion of SFCB Program

The amount of base funding available for the contractible portion of the SFCB program at Kincheloe is determined under Section 106(a)(1) of the Act. Section 106(a)(1) provides as follows:

The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall be not less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract.

As set out in the attached BAO/SFCB report, the amount the IHS would provide for the operation of the SFCB program at Kincheloe is determined by the Resource Requirements Methodology (RRM). Under the RRM analysis for fiscal year 1990, \$70,094 was available to fund the SFCB program at Kincheloe. Additionally, \$11,083 in project support funds was available, for a total amount of \$81,177. Using the percentages arrived at by the BAO/SFCB review, if MITC chooses to contract for the "maximum project activities" determined to be contractible, or 41.79% of the total program, the available base funding would have been \$33,924 for fiscal year 1990. Likewise, if MITC chooses to

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contract for the "initial project activities", or 37.58% of the total program, the available base funding would have been \$30,506 for fiscal year 1990. Under section 106(a)(2) of the Act, contract support costs would be added to the base amount determined under section 106(a)(1).

CONCLUSION

The requisition, cost estimate, and inspection activities of the SFCB program (or essentially all of the activities related to management of the actual construction contracts) are effectively required by the FAR to be conducted by federal employees. Thus, MITC's proposal that a tribally employed Field Engineer would serve as the technical representative for the government COR and would monitor project activity cannot be approved. The remaining portion of the SFCB program may be assumed under a Self-Determination Act contract.

Under section 106(a)(1) of the Act, the base funding available for this program for fiscal year 1991 will be the amount determined by the RRM to be available for the Kincheloe SFCB program, plus project support funds, multiplied by the percentage of total SFCB activities to be contracted. Under section 106(a)(2), contract support costs would be added to the base funding amount. The IHS may retain the portion of base funding available for the program commensurate with the portion SFCB program activities retained.

Lindsay Naas
Lindsay Naas